

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5567 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KARIMABIBI WD/O GULAM MOHAMMADMUSTUFA

Versus

ANKLESHWAR MUNICIPALITY

Appearance:

MR JC SHETH for Petitioners
MR BS PATEL for Respondent No. 1
MR JV DESAI for Respondent No. 2
MR AJ DESAI,AGP for Respondent No.4

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 21/02/97

ORAL JUDGEMENT

Rule.

I have heard both the sides at length on merits.
I, therefore, proceed to dispose of this petition finally
by issuing rule today.

2. The present petition is filed by one Karimabibi,
widow of Gulam Mohamed Mustufa and 6 others who are sons

and daughters of Karimabibi Mohamed Mustufa, to challenge the order passed by the Judicial Magistrate, First Class, Ankleshwar in Criminal Misc. Application No.159 of 1996, on 25th October, 1996 and the entries made in the birth register maintained by the respondent No.1 on the strength of the said order of the learned Magistrate.

3. The present petitioners are widow and children of late Gulam Mohamed Mustufa. The respondent No.2 is husband of respondent No.3 Jubedabibi. The said respondent No.3 Jubedabibi, it seems is claiming to be the daughter of late Gulam Mohamed Mustufa. The respondent No.2 as a power of attorney holder of respondent No.3 Jubedabibi filed an application bearing Criminal Misc. Application No.159 of 1996 in the Court of Judicial Magistrate, First Class, Ankleshwar, purporting to be an application under Section 13 (3) of the Registration of Birth and Death Act, 1968. The said application was filed by him on 25th June, 1996 and on 25th October, 1996, the said application was registered and was given Criminal Misc. Application No. 159 of 1996 and on the same day, the learned Judicial Magistrate disposed of the said application by allowing the same and ordering that the entry as regards the birth date of respondent No.3 Jubedabibi having born on 21st July, 1955 by showing her father's name as Gulam Mohamed Mustufa Shaikh be made. The learned Judicial Magistrate First Class has sent a letter along with copy of his order in Misc.Criminal Application No.159/96 to the Municipal Authorities-respondent No.1 and on the strength of the said copy of the order of the learned Judicial Magistrate, First Class, Ankleshwar, entry in the birth register as regards the birth of respondent No.3 Jubedabibi is made by respondent No.1.

4. It is the claim of the petitioners that the order passed by the learned Judicial Magistrate, First Class is illegal and contrary to the principles of natural justice. The learned Judicial Magistrate is expected to hold an inquiry and record his satisfaction about the correction of the birth date given in the application and only thereafter, he could pass an order regarding the birth date to be entered in the birth and death register. But the learned Judicial Magistrate, First Class has not at all followed the principles of natural justice and has disposed of the said application the same day of its registration by granting the same in favour of the applicant without application of mind. Consequently, the said order of the learned Magistrate is illegal and void, and, therefore, the said deserves to be quashed.

5. It is further contended that the learned Judicial Magistrate, First Class, ought to have issued notices to the petitioners who are heirs of the deceased Gulam Mohamed Mustufa. Then they would have brought to the notice of the learned Magistrate that the respondents Nos. 2 and 3 had earlier made an attempt on 26th February, 1982 to get the entry of birth date in the birth register as regards birth of respondent No.3 by showing her to be the daughter of late Gulam Mohamed Mustufa and the said entry was quashed and set aside on account of the complaint lodged by said Gulam Mohamed Mustufa. It is their contention that when the respondent No.3 wants to make a claim to be the legal heir of Gulam Mohamed Mustufa and when that claim of her is denied and disputed by the present petitioners, the proper forum or remedy for her was to go before the Civil Court and to get declaration that she is the legal heir of late Gulam Mohamed Mustufa. She has taken a wrong forum in order to establish her claim, and, therefore, in the circumstances, the order in question should be quashed.

6. Mr. B.S. Patel, the learned advocate for the respondent No.1-Municipal Authorities has submitted before me that the entry in question is made by the Municipal Authorities on account of the order communicated to respondent No.1- Municipal Authorities by the learned Judicial Magistrate by his letter dated 25th June, 1996 and that in view of the letter sent by the learned Judicial Magistrate First Class, Ankleshwar, they had no alternative than to make an entry in question. Therefore, no blame can be put on the Municipal Authorities.

7. Mr. Desai, the learned advocate for respondents Nos.2 and 3 contended before me that the petition involves complicated questions of facts, and, therefore, this court should not go into the said complicated facts of the case and in view of the involvement of complicated questions of facts, this court should summarily reject the petition. He also submitted that the application made by his client before the learned Judicial Magistrate First Class, Ankleshwar is proper and correct and that there is no illegality and there is no reason to interfere with the order passed by the learned Judicial Magistrate First Class, Ankleshwar. He thus, contended that the present petition be rejected with costs.

8. It is not in dispute that the application was presented by the respondents Nos. 2 and 3 before the Judicial Magistrate on 25th June, 1996 and on the very day it was registered and on the same day it was finally

disposed of by passing order in favour of respondents Nos. 2 and 3. It is not also in dispute that on the strength of the said order passed by the learned Judicial Magistrate First Class and on his sending letter to the respondent No.1, the respondent No.1 has made the entry in the birth and death register. Therefore, in view of the above admitted facts, I am unable to accept the contention of Mr. Desai, the learned advocate for the respondents Nos. 2 and 3 that there is an involvement of complicated question of facts which could not be gone into while exercising the discretionary jurisdiction under Article 226 of the Constitution of India.

9. Admittedly the application by respondents Nos. 2 and 3 has been made under Section 13 of the Registration of Births and Deaths Act, 1969. In order to consider the controversy involved in this proceeding as well as in order to see how the Judicial Magistrate has to exercise his jurisdiction while entertaining the petition under Section 13 of the said Act of 1969, it is necessary to consider the provisions of Section 13 of the said Act. The said provisions are running as under :

13 (1) Any birth or death of which information is given to the Registrar after the expiry of the period specified therefor, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

(2) Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorised in this behalf by the State Government.

(3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.

(4) The provisions of this section shall be without prejudice to any action that may

be taken against a person for failure on his part in register any birth or death within the time specified therefor and any such birth or death may be registered during the pendency of any such action.

Admittedly the application filed by the respondents Nos. 2 and 3 was under sub Section 3 of Section 13 of the said Act. If the above provision of sub Section 3 of Section 13 are considered, then it would be quite clear that it is the duty of the learned Judicial Magistrate to verify the correctness of the date of birth before allowing the application filed before him. When the law expects that he has to verify correctness of the birth, it is expected from him that he must hear the persons who would be interested in disputing or supporting the said application. No doubt the said Act of 1969 does not lay down any procedure as to how and in what manner the application is to be presented by the petitioner to the learned Judicial Magistrate. Not only that, the said Act of 1969 is not making any provision for the proceeding for filing such an application, but no procedure is also laid down by any rules framed under the said Act or by any other specific provisions of any Act. Therefore, in these circumstances, when any application is presented under Section 13 of the said Act after a period of 1 year from the date of birth or date of death, it would be incumbent on the applicant to state the reasons/grounds in his application as to why the earlier entry in the death or birth register could not be made and why he could not give the information regarding the same to the competent authority. He must justify his late action in filing such an application by making necessary averments in his petition. It is also further necessary for him to state the purpose for which he wants the entry in the birth register or the death register. He must also state in the said application as who are likely to be affected by the said entry in the birth register or death register. For example, if suppose the applicant is a person employed and he wants the entry in the birth register to correct his service record, then he must state in his application that purpose for which he has filed the application. He must give address of his employer where he is working because the order as regards his birth date will be affecting his employer and therefore, his employer will be interested in disputing the said claim by showing certain material before him which might have been produced by the applicant himself. Similarly the applicant must also state the name of both the parents of the person whose birth date is to be

entered in the Birth Register. If the said person has got brothers and sisters (even step brothers and step sisters), then their names, their address in his application must be given because they will be also interested in disputing or supporting his claim and therefore, they must have an opportunity to meet the claim of the applicant. In case of entry in birth register as regards the birth date, it is also necessary for the applicant to state the place where the birth of the person took place. The applicant must also give the name of the hospital or the maternity home or place where the birth of that person had actually taken place. He must also state the name of the person who had performed the delivery. In case, if the delivery was performed by any doctor or any nurse or Aaya, then he must also produce the evidence of the said person, if the said person is alive to support his claim. But merely on saying that he was born on such date without giving above indicated details, the application filed under sub Section 3 of Section 13 of the said Act could not be entertained by the Magistrate. But in case of an orphan child (deserted child) the names of father and mother need not be disclosed or stated. Similarly it is not necessary to state whether the child has got brothers or sisters. Because as the child is an orphan/deserted, the information in these respects could not be available. Similarly in case of an orphan/deserted child the information regarding the place of birth, who performed the delivery and where the delivery took place could not be available. Therefore, such informations need not be given in case of an application filed to record the birth date of an orphan/deserted child.

10. When all the above stated details are given in the application, it is also incumbent on the Magistrate to issue notice to those persons who are likely to be affected by his order. He should also insist on issuing a proclamation as is required while issuing a succession certificate. Without following the above stated procedure the Magistrate should not proceed to dispose of such an application because the granting of such relief is going to create a right in favour of the applicant and obligation against certain persons. When the obligations are created against such persons, they must have a reasonable opportunity to challenge the said act of the petitioner.

11. From the material on record it is quite clear that Magistrate has not at all taken into consideration all the above circumstances. Section 13 says that he has to verify the correctness of date of birth given in the

application. When he has to verify the same, unless all the details as mentioned above and the procedure as laid down above is followed by him, it is very difficult to hold that he has verified the correctness of the date of birth given in the application. Thus the original application itself was not properly filed and the learned Magistrate has not at all applied his mind by taking into consideration the provisions of Section 13 of the said Act of 1969. The very fact that the application is registered on 25-6-96 and it is decided on the very day clearly indicates non-application of mind and the order of the learned Magistrate is ex-facie perverse.

12. The learned advocate for the respondent No.1 has produced the letter issued by the Magistrate directing the Municipal Authorities to make entry in the birth register. If the provisions of Section 13 of the Act of 1969 are considered, then it would be quite clear that the said provisions do not lay down that the Magistrate is to give direction to the Municipal Authorities. It is not his business to direct the other officer to make entries in their public record. It is for the party to approach the Municipal Authorities and to get the necessary relief on the strength of the order passed by the Magistrate. The letters sent by the learned Magistrate to the Municipal Authorities is running as under :

"It is to be stated that the applicant in the case has filed Criminal Misc.Application No.159 of 1996 before this Court for registration of birth/death and the Hon'ble Court has passed the order as mentioned in the accompanying application. So, report this court after complying with the said order."

(Translation supplied)

The above letter issued by the learned Judicial Magistrate is without any authority for him to do so. Therefore, that practise of the learned Magistrate also deserves to be deprecated. He has to consider the provisions of the Act under which he has passed the order and he is expected to do what is expected under the law. He cannot travel beyond it.

13. Now in the instant case, the material on record clearly shows that respondent No.3 had earlier made attempt on 26-2-82 to get the entry of her alleged birth date of the year 1955 as the daughter of late Gulam Mohamed Mustufa in the Municipality Birth Register. The

said entry was disputed by Gulam Mohamed Mustufa by denying her claim that she is his daughter. Therefore, on account of his complaint, the said entry was deleted. The petitioner had concealed this fact from the Magistrate and had not at all disclosed the same. The respondent Nos. 2 and 3 have thereby played fraud on the learned Judicial Magistrate. The dispute between the petitioner and respondents Nos. 2 and 3 is regarding the legitimacy of respondent No.3. It is the claim of respondent No.3 that she is the daughter of Gulam Mohamed Mustufa, whereas it is the claim of the petitioner that she is not at all daughter of Gulam Mohamed Mustufa. So there is a dispute regarding the status of respondent No.3. When that dispute is as regards the status of respondent No.3, the proper action which the respondent No.3 is to take is to file a suit for declaration for status as the daughter of late Gulam Mohamed Mustufa. Therefore, the action of respondent No.3 in filing this petition is not bona fide one. It is a mala fide action. Therefore, it is not necessary to remand the matter to the trial court for deciding the said application of respondent No.3 by following the procedure as laid down earlier. The application of respondent No.3 is ill founded. The respondent No.3 should go to Civil Court to get the declaration of her status and she cannot have a short cut for her relief by making such malicious proceeding.

14. Therefore, in view of the above discussions, the present petition will have to be allowed. The order passed by the learned Judicial Magistrate First Class on 25th June, 1996 in Misc. Criminal Application No.159/96 is hereby quashed and set aside and the said application is hereby rejected. Similarly, the letter dated 25-6-96, issued by the learned Judicial Magistrate First Class, Ankleshwar to the Chief Officer of respondent No.1 is also quashed and set aside. The respondent No.1 should therefore, delete the entry in the birth register if the same is made on the strength of the said letter issued by the learned Judicial Magistrate First Class, Ankleshwar.

15. I also direct that this judgment should be circulated to all the Judicial Magistrate in order to follow the procedure as laid down by this court while deciding similar applications. Though I dismiss the original petition by allowing this petition, in view of the controversy between the parties, I direct the parties to bear their respective costs. Rule is made absolute accordingly.

